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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

E. GREY LEWIS and CAROLYN G. LEWIS,
Petitioners,

v.

PORT PACKET CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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QUESTIONS PRESENTED

The Virginia Supreme Court reversed a jury award of $100,000 in punitive damages against a newspaper that had published a libelous story on child abuse in which the parents of a nine-month-old boy, who died accidentally from a fall, were falsely accused of having murdered their son.

1. Does the Constitution require that actual malice be proven by "clear and convincing" evidence in order to sustain an award of punitive damages against a media defendant in a private figure defamation action?

2. Did the Supreme Court of Virginia misapply this Court's holding in *Bose Corp. v. Consumers Union* by conducting an independent review of the factual determinations underlying the jury's finding of actual malice, rather than limiting its review to the ultimate conclusion of actual malice reached by the jury in awarding punitive damages?

3. Did the Supreme Court of Virginia err in reversing the jury's award of punitive damages for want of "clear and convincing" proof of actual malice when the cumulation of circumstantial evidence relied upon by plaintiffs to prove that the defendant acted with "reckless disregard for the truth" clearly established that:

—The newspaper deliberately fabricated portions of the defamatory story;

—The newspaper knew of the harm that would likely result from publication of the defamatory story;

—The defamatory information published by the newspaper was contradicted by the newspaper's own sources for the story;

—The newspaper's editor deliberately penned a false headline;

—The newspaper suppressed information favorable to the parents;

—The newspaper resolved ambiguities in the story in the light most damaging to the parents;

—The newspaper was under no time constraints in preparing the story;

—The newspaper's investigation of the circumstances surrounding the accidental death of the parent's child was cursory; and

—Expert testimony received by the jury at trial convincingly established that the newspaper had violated proper journalistic standards in publishing the defamatory article at issue?

PARTIES

All parties are listed in the caption.

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PORT PACKET CORPORATION,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petitioners, E. Grey Lewis and Carolyn G. Lewis, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Virginia entered in this defamation action on February 1, 1985.

OPINION BELOW

The opinion of the Supreme Court of Virginia in this case also decided three other libel appeals. It is reported at —— Va. ——, 325 S.E.2d 713 (1985) *sub nomine The Gazette, Inc. v. James William Harris.* It appears in its entirety in the Joint Appendix to this proceeding. [Hereafter cited as J.A.]. The Joint Appendix is being filed this same day by respondent in its cross petition for writ of certiorari.

JURISDICTION

This case was decided and judgment was entered by the Supreme Court of Virginia on February 1, 1985. This petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is properly invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

1. First Amendment, United States Constitution: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

2. Fourteenth Amendment, Section 1, United States Constitution: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

Preliminary Statement

This is an action for libel by two private figures, E. Grey Lewis and Carolyn G. Lewis, against the Port Packet Corporation ("Port Packet"), publisher of *The Alexandria Port Packet*, a weekly newspaper circulated in Alexandria, Virginia. The action was brought in the state courts of Virginia and was tried before a jury. Following a four day trial, the jury returned a verdict for the Lewises in the amount of $50,000.00 compensatory damages and $100,000.00 punitive damages. After reviewing the relevant authorities, the instructions and the evidence, the trial court judge found that there was sufficient evidence to support the jury's verdict, both as to compensatory and punitive damages.

On appeal, the Supreme Court of Virginia affirmed the jury award of compensatory damages after finding the Port Packet's conduct to have been negligent. However it reversed the jury's award of punitive damages. Only that portion of the Virginia Supreme Court's opinion

bearing upon the question of punitive damages is at issue in this petition.

Background Facts [1]

Grey and Carolyn Lewis are residents of Alexandria, Virginia. On June 10, 1980, the Lewises' nine-month old son was seriously injured when he accidentally fell from a bed in the Lewises' home. Although the Lewises rushed the baby to Alexandria Hospital, he died two days later from head injuries sustained in the fall. J.A. at 32a.

Subsequently, the Alexandria Child Protective Services Unit and the Alexandria Police Department investigated the child's death as required by Virginia law. It was ruled accidental and the police officially closed their investigation of this tragic affair on July 28, 1980. *Id.*

The News Story at Issue

On July 16, 1980, while the Alexandria police investigation of the accidental death of the Lewises' nine-month old son was still continuing, the Port Packet published the first of a two-part series of articles on the subject of child abuse in the Alexandria community. The article which is the main subject of this case was headlined: "2 TOTS DIE AS CHILD ABUSE CLIMBS." It was written by Port Packet reporter Adrian Higgins. J.A. at 60a-64a.

The first four paragraphs of this article provide the reader with the following information:

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[1] In presenting all the facts of this case, petitioners rely on the Virginia Supreme Court's recitation of the facts, J.A. at 31a-44a, and also on the complete trial record contained in the joint appendix to this case when it was before the Virginia Supreme Court. To avoid confusion, references to the complete trial record set out in the joint appendix relied upon by the lower court will be cited as "Record."

> "Early in June, nine-month-old Mark fought for his short life after receiving head injuries in what police believe was a vicious attack on the infant. Mark lost his fight.
>
> "The same week two-year-old Robert also suffered a skull fracture in another suspected attack. Robert clung to life for two weeks.
>
> "On April 28, a Monday, five-year-old Asia Marie returned to a city day care center after a weekend spent with her teacher's aide displaying signs of a severe beating. Asia's two-year-old sister came back with lesser injuries.
>
> "What all these frail victims are believed to have in common is exposure to one of Alexandria's fastest growing social problems: child beating."

J.A. at 32a-33a.

In succeeding paragraphs Higgins cited statistics on the growing incidence of child abuse in Alexandria and provided commentary to the effect that parents were largely responsible for this increase.

The specific child abuse cases reported in the article's lead paragraph were then further detailed. Specifically, the Port Packet reported:

> "Denied even the pains of childhood, nine-month-old Mark (not his real name) received a fractured skull during the first week of June and was taken to Alexandria Hospital where he died two days later. Detectives are treating his death as a homicide.
>
> "The same week two-year-old Robert (not his real name) suffered similar injuries. At a time when other kids his age are curiously exploring life's trinkets, Robert was taken to Alexandria Hospital and then transferred to D.C. Children's Hospital to receive more specialized care. Hooked up to life support systems in a futile attempt to revive him, Robert was declared medically dead two weeks later.

> Based on autopsy reports, Alexandria police investigators are also treating Robert's death as a murder."

J.A. at 33a-34a.

Higgins then concluded the article by returning to the theme that parental abuse was the leading cause of this problem. An Alexandria police sergeant, Ronald Urhig, was quoted as saying that the biggest problem police had in obtaining more convictions in child abuse cases was that, "you have two parents [of an abused child] and one won't testify against the other and doesn't have to." J.A. at 34a.

The same edition of the Port Packet carried a second article on this subject. Headlined "CHILD ABUSE," the article was an editorial written by the paper's editor calling for a public crusade against parental child abusers. J.A. at 34a; 65a. Relying on the purported facts set out in Higgins' page-one lead article, the editorial stated that it was necessary for the public and police to learn more about child abusers in order to prevent the crime. As a "solution" to the problem, the editorial proposed the following:

> "It may be that publicity is the main weapon against the child abuser. It is a shameful thing to be known as a child abuser. It might influence the abuser if he or she knew that the glare of news coverage and the probability of the neighbors knowing all about [sic] was part of the act.
>
> "Could it work?"

Id.

In April of 1981 the Lewises filed suit against the Port Packet for libel. They contended that even though a fictitious name had been used, the details provided in Higgins' article about "Mark's" death were sufficiently specific to enable an ordinary reader in the Alexandria community to be able to identify their son. Accordingly,

the Lewises charged that they had been falsely accused by the paper of being child abusers who had murdered their son. Both compensatory and punitive damages were sought as a means of vindicating the injury to their reputations and punishing the newspaper's allegedly reckless conduct.

The Trial

A number of issues were presented to the jury for resolution at trial.[2] Moreover the case raised questions of first impression for the State of Virginia post-*Gertz*.[3] However only one issue is of relevance to the instant petition, namely, whether the evidence of actual malice introduced at trial was sufficient under either a clear and convincing[4] or a preponderance of the evidence standard to sustain an award of punitive damage against the Port Packet. An examination of this evidence is therefore necessary.

It was established at trial that the original draft of the child abuse article concerned the case of an Alexandria child whose mother had accused a teacher's aide of abusing her daughter. Port Packet reporter Adrian Higgins investigated the incident, but he and Port Packet editor/publisher James Coldsmith decided that, because of charges and countercharges, the article had lost much of its newsworthiness, i.e., it was too "unwieldly." Record at 294. Higgins and Coldsmith were frustrated that two

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[2] Such issues included: whether there was sufficient identification of the Lewises in the offending article to form a basis for an action of libel; whether the article was both false and defamatory; whether the paper breached any standard of care owed the Lewises; and, if so, whether the newspaper acted negligently and/or with actual malice.

[3] E.g., what standard of liability should govern an award of compensatory and punitive damages in a private figure libel action and what the appropriate scope of appellate review should be.

[4] The jury was instructed under a clear and convincing standard of proof.

months of investigation had been for naught. Record at 887. They decided to broaden the article to deal with the general problem of child abuse and set about finding evidence of this problem for their story. J.A. at 34a-35a.

As part of his general background work on child abuse, Higgins interviewed Ms. Francine Rosenfeld, then head of the Child Protective Services Unit of the Alexandria Social Services, the agency charged with the investigation of child abuse cases. But in response to a direct question from Higgins, Rosenfeld informed him that there had been no child abuse deaths in the City of Alexandria in recent months. Record at 473.

Shortly after speaking with Rosenfeld, Higgins contacted Sgt. Ron Uhrig, then Commander of the Youth Services Division of the Alexandria Police Department. Record at 297. Uhrig told Higgins that the police department was investigating the death of a nine-month-old male, who died of a skull fracture not consistent with a normal fall in early June at Alexandria Hospital, two days after the injury. Uhrig told Higgins that the case was classified as a suspicious death and that it was being investigated procedurally as a homicide. But equally important is what Sgt. Uhrig did *not* tell Higgins: that anyone at the police department believed the baby had been viciously attacked; that the death was being treated as a murder; or that the child had died of a result of child abuse. J.A. at 35a.

Higgins obviously ignored Rosenfeld's statement that no children had died as a result of child abuse and made no attempt to contact her further to verify or challenge her statements. Record at 315. Instead, he contacted Assistant Commonwealth's Attorney Randolph Sengel to further discuss the facts surrounding the death of the nine-month-old boy. Sengel likewise told Higgins that this case was procedurally labelled a "suspicious death," that the result could well have been accidental, and that the case was not at the time classified as a child abuse case. Rec-

ord at 421, 423. One of petitioners' two expert witnesses described Sengel's message to Higgins as a "flashing yellow light" to either delete the "Mark" incident from the planned story or to delay publication to conduct further investigation. Record at 532.

Evidence was also introduced at trial sufficient to establish that Higgins: did not attempt to speak to the investigating officer involved in the Lewis child's death, Record at 315; attempt to reconcile Ms. Rosenfeld's statement with Sgt. Uhrig's, Record at 315; check autopsy reports, police reports, or hospital records, Record at 316-317; check recent obituaries to ascertain the identity of the child, Record at 317; and did not call Sgt. Uhrig between July 9 and July 16, Record at 312, although the actual investigating officer in this case testified that on July 9 he received information from the Medical Examiner that the injuries were consistent with a fall and relayed this information to Uhrig on or about the same date. Record at 798.

In the course of writing the story the evidence also established that Higgins: fabricated the words "vicious attack" and falsely attributed them to a police source, J.A. at 35a; included the incident in a child abuse article after being told by the prosecutor (his second direct source) that it was not a child abuse case, Record at 423; ignored all negative sources and improperly expanded the words of his only neutral source (Uhrig) in order to be more graphic, Record at 454; and did not use the words "suspicious death," "procedural classification," or "possible accident" in his article, Record at 197-198.

During the trial both Mr. and Mrs. Lewis submitted evidence of the devastating effect publication of the article had had upon them. Carolyn Lewis testified that she was frightened, lost sleep, and had horrible stomach aches. J.A. at 42a. Mrs. Lewis recalled one occasion in a local supermarket when an acquaintance turned her back to Mrs. Lewis. J.A. at 41a. Mrs. Lewis was aware

that the article had been discussed at social events, and thus limited their social life. *Id.* Further, Mrs. Lewis felt she had been stripped of the ability to discipline her young daughter for fear neighbors would think the child was being abused. *Id.*

Mr. Grey Lewis, an attorney practicing in nearby Washington, D.C., felt isolated after the article appeared. A long-time resident of "Old Town" Alexandria, he withdrew from social events and avoided bar functions as a result of the article. J.A. at 42a. He felt awkward, humiliated, and afraid that everyone believed he had viciously attacked his own baby. *Id.* He noticed that the outpouring of support his friends had given him after the baby's death had stopped after the article appeared. Record at 666. Coming so soon after his son's death, he stated that the accusations in the article felt like someone had stuck a knife in an open wound and twisted it. Record at 662. Mr. Lewis feels that his public service career has ended since an Administration would consider him "carrying baggage"—the suspicion that he abused his child to death. J.A. at 42a.

In addition to receiving this evidence of damages sustained by the Lewises, the jury was also provided with an opportunity to assess the credibility, motive and intent of Port Packet reporter Higgins and editor/publisher Coldsmith. Both men took the stand and were examined at length concerning whether there were serious doubts about the truth of portions of the article prior to its publication. J.A. at 35a; 40a.

Finally, the jury also heard and considered expert testimony on the standard of care exercised by the Port Packet in publishing the article at issue. Joseph Tinkelman, a journalism professor at American University and Charles Seib, who spent forty years in the newspaper business, culminating in the prestigious roles of managing editor of the *Washington Star* and ombudsman for *The Washington Post*, testified. Both men explained to

the jury the standards of professional journalism in Alexandria, Virginia and how, in their opinions, the Port Packet violated these standards. Each witness went on to testify that the conduct of Higgins and Coldsmith transcended a failure to adhere to these journalistic standards and reached the level of obvious awareness of falsity.

Following the introduction of this evidence, the jury was instructed on the standard of proof prerequisite to an award of compensatory and/or punitive damages. They returned a verdict of $50,000.00 compensatory and $100,000.00 punitive damages. The evidence and awards were then separately reviewed by the trial court judge. He found the totality of circumstantial evidence bearing upon the Port Packet's intent in publishing the article to be sufficient to prove both negligence and "reckless disregard" actual malice for purposes of the punitive damage award. He also found the damage awards to be reasonable in light of the fact that two plaintiffs had sued. Accordingly, the jury verdict and awards were sustained. J.A. at 32a.

The Decision of the Virginia Supreme Court

The newspaper appealed the adverse jury award of compensatory and punitive damages to the Supreme Court of Virginia. All issues concerning identification of the Lewises in the article, the false and defamatory nature of the article, proof of harm to the Lewises' reputations and negligence in publication were again resolved against the newspaper. Accordingly, the award of compensatory damages was affirmed. J.A. at 41a.

However on the issue of punitive damages, the Court below held that this Court's recent decision in *Bose Corp. v. Consumers Union* required it to conduct an independent review of the evidence in the record on appeal in order to decide whether the evidence supported a finding of "actual malice." J.A. at 16a; 43a. The Virginia Supreme Court immediately qualified this holding as follows:

> This does not mean that the reviewing court may disregard the determinations made on credibility of witnesses by the trier of fact or that the presumption of correctness that attaches to factual findings is to be discounted.

J.A. at 16a.

Despite the stated limitation on the scope of its reviewing power, when the Virginia Supreme Court actually undertook its independent examination of the evidence it questioned the jury's preliminary factual determinations and declined to draw all reasonable inferences in favor of its verdict.

Thus, where the jury found that the newspaper had acted in reckless disregard of the truth in publishing the article without adequately researching it, the Supreme Court of Virginia, after its de novo review of the evidence, found that "the articles were researched in depth." J.A. at 43a.

Similarly, where the jury had found that the defamatory articles had been recklessly assembled and edited, the lower court's findings on the same evidence were again to the contrary: "The articles were edited in a deliberate fashion with consideration given to accuracy." *Id.*

The most telling indication of the sweep of the Supreme Court of Virginia's review was its *de novo* finding on the question of the Port Packet editor's credibility. In finding for the Lewises on the issue of actual malice, the jury carefully assessed Coldsmith's credibility when he was on the stand. It concluded that Coldsmith acted recklessly by failing to comply with the standards of proper journalism when he published the article. The Supreme Court of Virginia, with nothing but the cold record to rely on, specifically found to the contrary. "The editor approved the article for publication believing it complied with standards of proper journalism." *Id.*

Not only did the lower court eviscerate the factfinding role of the jury on appeal, but it also held, as a matter of federal constitutional law, that the First Amendment required actual malice in a defamation action to be proven by "clear and convincing" evidence. J.A. at 16a. The court found this to be the case even if the plaintiffs in the action, as here, were private rather than public figures.

In fact, the court explicitly refused to consider whether the private figure status of the Lewises entitled them to a lower evidentiary standard, such as a mere preponderance, in proving actual malice. *Id.* For the court, the fact that punitive damages must be proven by "actual malice" automatically required a standard of clear and convincing proof. "[O]n the issue of punitive damages . . . the evidence in the record on appeal [must be] sufficient to support a finding of *New York Times* 'actual malice' by clear and convincing proof." J.A. at 16a; 43a.

Thus in conducting its independent review of the evidence in the record on appeal, the court not only refound several of the jury's factual determinations, but also held that whatever circumstantial evidence of malice did exist was insufficient "to clearly and convincingly prove the defendant made the statements knowing they were false or made them so recklessly as to amount to a willful disregard for the facts." J.A. at 43a.

Finally the court suggested that the editor's assertion that he believed publication of the defamatory article had met proper journalistic standards, coupled with the fact that neither the reporter nor the editor on the story confessed to having had actual doubts regarding the truthfulness of the articles, were sufficient to prove lack of actual malice. *Id.* The court expressly declined to accept

petitioner's argument that the web of circumstantial evidence introduced at trial was sufficient to demonstrate actual malice recklessness.

For all these reasons the Supreme Court of Virginia reversed the jury judgment as to the punitive damage award. J.A. at 44a.

REASONS FOR GRANTING THE WRIT

I. THE CASE PRESENTS AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW NOT YET SETTLED BY THIS COURT.

A. *Gertz v. Robert Welch, Inc.* Left Unresolved Whether Private Figure Libel Plaintiffs Must Prove Actual Malice by "Clear and Convincing" or Simply "A Preponderance" of the Evidence In Order to Support an Award of Punitive Damages.

The Supreme Court of Virginia explicitly relied upon this Court's holding in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) as support for the remarkable proposition that: "all persons, public or private, may recover presumed or punitive damages *only upon clear and convincing proof of New York Times malice.*" J.A. at 6a (emphasis added). But the Virginia Supreme Court's reliance on *Gertz* for the creation of this new rule of federal constitutional law is misplaced. *Gertz* left unresolved the fundamentally important question as to whether actual malice, in the punitive damages context, must always be proven by clear and convincing evidence regardless of the private figure status of the libel plaintiffs.

Moreover the policy considerations articulated in *Gertz* as valid reasons for allowing the states wide latitude in protecting the reputational interests of private citizens, counsel just the opposite result. Employing a lower "preponderance of the evidence" standard to judge the suffi-

ciency of actual malice evidence where a private figure plaintiff seeks an award of punitive damages would be consistent both with the First Amendment and the reputational interests at stake. The Virginia Supreme Court was simply wrong to conclude otherwise.

1. Gertz's *Treatment of Punitive Damages in the Private Figure Context is Ambiguous.*

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) imposed constitutional limitations on the recovery of damages by private individuals in defamation actions. The issue of what these limitations are in the context of punitive damage awards is briefly treated in two places. First the Court established as a rule of federal constitutional law that: "the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." 418 U.S. at 349. Second, after discussing the dangers of uncontrolled punitive damage awards, the Court reiterated this holding in somewhat different fashion: "In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by [*New York Times v. Sullivan*] may recover only such damages as are sufficient to compensate him for actual injury." 418 U.S. at 350.

Clearly then, this Court's decision in *Gertz* adopts the actual malice standard of conduct set forth in the landmark *Sullivan* case as a predicate to the award of punitive damages in a private figure libel action. Petitioners do not challenge the Virginia Supreme Court's reading of *Gertz* to this limited extent.

The fundamental question *Gertz* leaves unresolved, and what petitioners are challenging through this application for certiorari, is the notion that *Gertz* and, by extension, the First Amendment to the Constitution, explicitly mandate only a clear and convincing standard of proof in

private figure defamation actions on the question of punitive damages.[5]

Petitioners are unaware of any decisions of this Court subsequent to *Gertz* which have resolved, let alone addressed, this substantial federal question. It thus appears to be one of first impression. For the Supreme Court of Virginia to have mistakenly assumed that it was constitutionally compelled to erect a clear and convincing standard of proof in private figure libel actions thus warrants immediate review and correction by this Court.

2. *Policy Considerations Discussed in* Gertz *Convincingly Demonstrate That a Preponderance of the Evidence Standard is Fully Compatible with First Amendment Interests.*

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court linked the actual malice intent requirement to a clear and convincing standard of proof. However this holding clearly occurred in the context of a public figure defamation action. Subsequently, in *Gertz*, the Court required private figure plaintiffs to prove actual malice in order to recover punitive damages. It was completely silent, however, on the proper evidentiary standard of proof required, i.e., "clear and convincing" or "a mere preponderance" of the evidence.

In resolving this ambiguity, the Supreme Court of Virginia reasoned that because actual malice is always proven by clear and convincing evidence in the public figure context, the Court in *Gertz* must have meant to require the same standard of proof when it established an actual malice burden in the private figure/punitive damages setting. But the policy considerations discussed in *Gertz* to allow states greater latitude to protect pri-

---

[5] Petitioners accept that in *public* figure cases, actual malice must always be proven by clear and convincing evidence as *Gertz* explicitly held. *Gertz*, 418 U.S. at 342.

vate figure reputations would appear to counsel just the opposite result.

In *Gertz* the Court established a fundamental distinction between public and private figures for purposes of defamation law. Whereas,

> the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them . . . . [n]o such assumption is justified with respect to a private individual . . . . He has relinquished no part of his interest in the protection of his good name, and consequently has a more compelling call on the courts for redress of injury . . . . Thus, private individuals are not only more vulnerable to injury than public officials and public figures, they are also more deserving of recovery.

Gertz, 418 U.S. at 345.

It was for these reasons that the Court concluded the First Amendment's limitations with respect to damage awards should not be as extensive when private figures were involved. Accordingly, the Court emphasized that the states had a "strong and legitimate . . . interest in compensating private individuals for injury to reputation. . . ." *Id.* at 348-49. The state's interest in compensating private individuals was limited, however, when it came to punitive damages. *Id.* at 349. There the Court required actual malice be proven. This requirement in itself represents a significant accommodation of the state's interest in punishing and deterring wrongful conduct to First Amendment values. In light of the limited means available to a private figure to redress injury to reputation, it is clearly excessive to hold as a matter of federal constitutional law that all private figures must meet the actual malice test by a clear and convincing standard.

Simply put, the states must be allowed wider discretion under the Constitution to deter defamation in the case of private figures who have surrendered none of their right to personal privacy by entering public life and who are not involved in public debate. As one commentator has noted:

> Although all libel plaintiffs have an interest in receiving compensation for injury to their reputation, private figure plaintiffs have a greater interest in preventing attention from being focused on their lives in the first place . . . . Thus if punitive damages serve the function of deterring such unauthorized prying, they might be awarded despite their chilling effects on the media. Since private figure plaintiffs have a greater interest in keeping the details of their lives undisclosed, punitive damages are more appropriate in such cases. Public figures or public officials subject even their "personal attributes" and character to the media's inspection by entering public life, and they have less of an interest in deterring prying into their affairs.

Comment, *The Constitutionality of Punitive Damages in Libel Actions*, 45 Ford. L. Rev. 1382, 1402-1403 (1977) (footnotes omitted).

Given that "the protection of private personality, like the protection of life itself, is left primarily to the individual states," *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring), states like Virginia should be constitutionally free to award punitive damages to private figures where actual malice has been proven by a mere preponderance of the evidence.

What the Supreme Court of Virginia has done is to "sacrifice good sense to a syllogism." Holmes, *The Common Law* 36 (1881). Proof of actual malice by clear and convincing proof in the public figure setting does not require the adoption of similar "clear and convincing" federal standard in the private figure/punitive dam-

ages context. Indeed such a radical invasion of the perogatives of the states runs directly counter to *Gertz*'s policy proscriptions.

If the Virginia Supreme Court's decision is permitted to stand it will effectively deprive all hapless ordinary citizens in Virginia who are libeled by the press of the opportunity to recover punitive damages. Further, it will create additional precedent for the erroneous notion that the First Amendment compels a clear and convincing standard whenever actual malice is required, regardless of the status of the individual plaintiff. *See infra* at 19-20. This Court should therefore grant certiorari to resolve this timely and important question.

B. Lower Courts Are Divided As To Whether Actual Malice Must Be Proven By "Clear and Convincing" or "A Preponderance" of the Evidence In Order To Support an Award of Punitive Damages After *Gertz*.

The lower federal and state courts are divided as to whether actual malice must be proven by "clear and convincing evidence," or simply by "a preponderance" of the evidence in order to support an award of punitive damages to private figures post-*Gertz*. *See generally*, 2 Goodale, *Communications Law 1984*, 646-647 (1984); *Marcone v. Penthouse Int'l, Ltd.*, 577 F.Supp. 318 (E.D. 1983).

Thus in *Rimmer v. Colt Industries Operating Corp.*, 656 F.2d 323 (8th Cir. 1981), Judge Bright writes in concurrence that: "Under the *Gertz* standard . . ., a [private] plaintiff, to recover punitive damages, must prove by a preponderance of the evidence, that [the defendant] made a false statement, knowing it to be false or with reckless disregard for its truth." *Id.* at 331.

Similarly, in *Pirre v. Printing Developments, Inc.*, 468 F.Supp. 1040 (S.D.N.Y. 1979) the court discussed *Gertz* at length in its deliberations as to whether a punitive

damage award to a private figure could be sustained on a mere preponderance standard. It concluded:

> Defendant suggests the strength of the free speech interests here . . . compels application of the burden of convincingly clear proof. By focusing on the context and nature of the speech, rather than the status of the plaintiff as a public or private individual, defendant's approach is akin to that of the *Rosenbloom* plurality, which the Court repudiated in *Gertz*. *Since Pirre is a private person, we conclude that beyond the minimal restrictions spelled out in Gertz, the constitution leaves it to Connecticut to define the appropriate standard of proof.*[6]

Id. at 1043 (footnote omitted) (emphasis added). A preponderance standard was adopted. *Accord, Miller v. Lear Siegler, Inc.*, 525 F.Supp. 46, 62 (D.Kan. 1981).

However other lower federal and state courts have reached the same result as the Supreme Court of Virginia on this issue. For example, in *Meadows v. Taft Broadcasting Co.*, 470 N.Y.S. 2d 205 (4th Dep't 1983), the Supreme Court of New York found that:

> Plaintiffs' claim for punitive damages is, of course, dependent upon a showing that defendants acted with actual malice . . . . We recognize that if the requirement of showing actual malice is to be an effective aid in promoting First Amendment freedoms, evidence of it should be clear and convincing.

Id. at 208 (citations omitted). *Accord, Fitzgerald v. Penthouse Int'l, Ltd.*, 525 F.Supp. 585, 597 (D. Md. 1981), *rev'd* 691 F.2d 666 (4th Cir. 1982) (appeals court did not reach burden of proof issue in deciding that a genuine issue of material fact existed as to actual malice), *cert. denied*, 103 S.Ct. 1277 (1983); *General Products*

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[6] It is important to reemphasize that the Virginia Supreme Court held as a matter of *federal* not state law that the standard of proof required was "clear and convincing." J.A. at 6a.

Co. v. Meredith Corp., 526 F.Supp. 546, 552 (E.D. Va. 1981).

This conflict running through the judiciary is further complicated since, as the U.S. District Court for the Eastern District of Pennsylvania pointed out in *Marcone v. Penthouse, Int'l Ltd.*, 577 F.Supp. 318, 326 (1983):

> Several courts have also stated that a showing of actual malice is required before punitive damages may be awarded to a private figure plaintiff, without stating explicitly the standard of proof to be applied. *Golden Bear Distributing Systems v. Chase Revel, Inc.*, 708 F.2d 944, 947 (5th Cir. 1983) (implying that the standard is the same as that needed to establish liability by a public figure); *Wilson v. Scripps-Howard Broadcasting Co.*, 642 F.2d 371, 375 n.1 (6th Cir.), *cert. granted*, 454 U.S. 962, 102 S.Ct. 500, 70 L.Ed. 2d 377, *appeal dismissed* 454 U.S. 1130, 102 S.Ct. 984, 71 L.Ed.2d 119 (1981); *Littlefield v. Fort Dodge Messenger*, 614 F.2d 581, 584 (8th Cir.), *cert. denied*, 445 U.S. 945, 100 S.Ct. 1342 63 L.Ed.2d 779 (1980); *Jenoff v. Hearst Corp.*, 453 F. Supp 541 (D. Md. 1978), *aff'd* 644 F.2d 1004 (4th Cir. 1981) (implying the standards are the same); *Handleman v. Hustler Magazine, Inc.*, 469 F.Supp. 1053, 1059 n.11 (S.D.N.Y. 1979).

Thus, as the law now stands after the decision below, private figure libel plaintiffs in Virginia may only obtain punitive damages upon a showing of actual malice by clear and convincing evidence. The Virginia Supreme Court has held that the United States Constitution and the decision of this Court in *Gertz* compel such a result. Yet private figure libel plaintiffs in other states and jurisdictions are not barred from obtaining punitive damages upon a showing of actual malice by a simple preponderance of the evidence standard.

This is an intolerable conflict among the states and federal circuits on a fundamental matter of federal constitutional law. It is wholly unfair to private figure libel

plaintiffs residing in states like Virginia who are victimized by outrageous and defamatory media conduct such as that *sub judice*. At a time of escalating media assaults on individuality and personal dignity and a corresponding increase in the filing of libel suits by private figures nationwide, this Court should accept certiorari in order to address clearly the issue of how far punitive damage awards are properly limited by the First Amendment.

II. THE DECISION BELOW IS IN CONFLICT WITH APPLICABLE LIBEL DECISIONS OF THIS COURT.

A. The Supreme Court of Virginia Misapplied This Court's Holding in *Bose v. Consumers Union* by Conducting An Independent Review of the Factual Determinations Underlying the Jury's Finding Of Actual Malice, Rather Than Limiting its Review to the Ultimate Conclusion of Actual Malice.

The decision of this Court in *Bose Corp. v. Consumers Union*, 52 U.S.L.W. 4513 (U.S. April 30, 1984) (No. 82-1246), reaffirmed the proposition first established in *New York Times v. Sullivan* that appellate courts are obliged under the First and Fourteenth Amendments in defamation actions instituted by public officials to undertake an " 'independent examination of the whole record,' in order to make sure 'that the judgment does not constitute a forbidden intrusion on the field of free expression.' " *Id.* at 4517 (*quoting New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964)). The Court stressed the fact that: "Judges as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of actual malice." *Id.* at 4520.

The level of appellate review mandate by *Bose* occurred in the context of a public figure libel action. By

contrast, the plaintiffs in this case are private figures. This case thus represents an important factual variation on *Bose* which the Court should consider in order to give further clarification to just how far independent appellate review extends in light of the reputational interests at stake.

In *Levine v. CMP Publications, Inc.*, 738 F.2d 660, 672, fn.19 (5th Cir. 1984), a divided panel of the Fifth Circuit stated its conviction that:

> the more rigorous standard of review mandated by *Bose Corp. v. Consumers Union of United States, Inc.*, —— U.S. ——, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984), for awards of actual damages in defamation suits brought by public-figure plaintiffs, is inappropriate [in a private defamation plaintiff context]. Ten years ago in *Gertz* the Supreme Court recognized that there are important, salutary and constitutionally founded reasons for maintaining distinctions between defamation actions brought by private individuals and those brought by public figures and for allowing the states to regulate the former within much less restrictive bounds than those imposed by the federal courts in the latter. Until the Supreme Court overrules it, this court must abide by *Gertz* by applying principles of state, not federal law to defamation suits brought by private persons.

(But, *cf.* Judge Tate, dissenting: ". . . it seems to me that the [Supreme] Court's rationale [in *Bose*] extends to appellate review . . . whether it be an alleged libel against (as here) a private person or a public figure." 738 F.2d 66, 684-685.)[7]

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[7] *Bose* being a relatively recent opinion, the Fifth Circuit appears to be the only court to have addressed the question of whether the *Bose* standard of independent appellate review applies as vigorously in the private figure context as it does in the public figure context. One need not be clairvoyant, however, to see that this conflict will

Petitioners strongly agree with the Fifth Circuit's reasoning on this question. *Gertz is* properly read as allowing less rigorous appellate review of jury findings in defamation actions brought by private citizens against media defendants. The same policy considerations analyzed above apply. *Supra* at 15-18.

However, assuming, *arguendo*, the Supreme Court of Virginia correctly read *Bose* to require a rigorous independent appellate review of a punitive damage award recovered by private figures, the lower court nevertheless misapplied *Bose* by refusing to limit the application of its independent judgment to the jury's ultimate conclusion of actual malice. Instead, the Supreme Court of Virginia impermissibly reexamined the evidence introduced at trial. After doing so, it then chose to believe the newspaper's assertion that it had not acted with reckless disregard for the truth. Moreover, it did so when the jury, on the basis of its first-hand evaluation of the credibility of the principal witnesses, had reached precisely the opposite conclusion.

It cannot seriously be contended that *Bose* either held or even suggests that appellate courts are free to make whatever factual determinations they desire in reviewing defamation cases. *Tavoulareas v. Washington Post*, No. 83-1605, slip op. at 22-25 (D.C. Cir. April 9, 1985). On the contrary, *Bose* requires appellate courts to exercise their independent judgment solely on the ultimate issue, i.e., whether there is sufficient evidence of actual malice when the record is viewed as a whole. Moreover, in evaluating the record, the totality of the evidence must be viewed in the light most favorable to the plaintiff. *Id.* at 26.

To leave standing the broad powers of *de novo* review claimed by the Virginia Supreme Court under *Bose* would

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soon be duplicated both within and among the other federal circuits. Preventing this incipient conflict from developing and creating further uncertainties in the law of defamation is another reason for granting review at this time.

be to sanction the vesting of all appellate courts around the country with original jurisdiction in libel actions. This Court should grant review to reverse the Virginia Supreme Court's misapplication of *Bose* and thereby prevent the further evisceration of jury awards by appellate courts under *Bose*'s purported authority.

B. The Supreme Court of Virginia Ignored Relevant Libel Decisions of This Court Bearing on Proof of the Reckless Disregard Component of Actual Malice.

In order for petitioners to recover punitive damages under *Gertz*, they were required to show that respondent acted with actual malice. Actual malice has been defined by this Court to mean publication with knowledge of falsity or with "reckless disregard" of whether the story was false or not. *New York Times Co. v. Sullivan*, 376 U.S. at 280.

The Court has defined the "reckless disregard" component of the actual malice requirement variously as "a 'high degree of awareness of . . . probable falsity' ", *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) *quoting Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) and as whether "the defendant . . . entertained serious doubts as to the truth of his publication." *St. Amant, id.* Justice Harlan's plurality opinion in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967), held that recovery under this standard might also be grounded upon "a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."

This Court has recognized that proof of "reckless disregard" sufficient to establish actual malice cannot be encompassed by any one formula. Judicial determination that a given factual situation comes within the orbit of actual malice is to be made on a case by case basis. *St. Amant*, 390 U.S. at 730-731. Because establishing reck-

less disregard necessarily requires a showing of subjective doubts on the defendant's part, it is difficult to prove. This is not to suggest, however, that this and other lower federal courts have failed to provide adequate guidance on how a libel plaintiff may prove reckless disregard for the truth.

We begin with this Court's statement in *St. Amant*, ignored by the Supreme Court of Virginia, to the effect that:

> The defendant in a defamation action . . . cannot . . . automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith.

St. Amant, 390 U.S. at 732.

The finder of fact in this instance was the jury. After hearing the evidence, it determined that the defamatory statements at issue had not been published in good faith but with reckless disregard for the truth. However, the Virginia Supreme Court, in contravention of *St. Amant*, overturned this finding reasoning that: "The editor approved the article for publication *believing* it complied with standards of proper journalism." J.A. at 43a (emphasis added). Stated differently, the Virginia Supreme Court relied solely upon testimony by respondent to the effect that he published with a belief that the article was true to exonerate the Port Packet of the charge of having acted recklessly. Yet the trial judge correctly noted that the editor deliberately penned a false headline. Record at 914. *See Sprouse v. Clay Communications, Inc.*, 211 S.E.2d 674, *cert. denied*, 423 U.S. 882 (1975). This substantial departure from *St. Amant* alone warrants rereview and reversal of the Virginia Supreme Court's action by this Court.

Equally serious as the contravention of this Court's holding in *St. Amant*, is the lower court's refusal to view

the cumulation of circumstantial evidence introduced at trial by petitioners as proof of respondent's reckless conduct. In a series of decisions by this and lower federal courts it has been clearly established that a variety of circumstantial, yet objective factors, are relevant where the mental state of a libel defendant is at issue. Thus, this Court has held that the following circumstantial factors are evidence of actual malice: (1) publication with serious doubt, *St. Amant*, 390 U.S. at 731; (2) evidence that a newspaper followed a sensationalistic news reporting policy, *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 167 (1967); (3) the known unreliability of sources, *St. Amant*, 390 U.S. at 732; (4) knowledge of harm likely to follow publication, *Curtis Publishing Co.*, 388 U.S. at 170; (5) urgency of publication, *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); and (6) the resolution of inferences adverse to the plaintiffs, *Time, Inc. v. Pape*, 401 U.S. 279 (1971).

To this catalogue of indicia of reckless disregard, lower federal and state courts have added: evidence of motive and intent, *Goldwater v. Ginzburg*, 414 F.2d 324, 342 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970); suppression of information favorable to the plaintiffs, *Indianapolis Newspapers, Inc. v. Fields*, 259 N.E.2d 651, *cert. denied*, 400 U.S. 930 (1970); and refusal to retract after a showing of falsity, *Golden Bear Distributing Systems of Texas v. Chase Revel, Inc.*, 708 F.2d 944 (5th Cir. 1983).

Collectively these cases clearly enunciate this Court's view that actual malice recklessness may be inferred from an accumulation of circumstantial evidence. *See Tavoulareas v. Washington Post*, No. 83-1605, slip op. at 37-39 (D.C. Cir. released April 9, 1985).

In attempting to meet this cumulative test of reckless disregard, petitioners relied upon various indicia of intent for the purpose of establishing by cumulation and by appropriate inferences the requisite degree of culpa-

bility. Thus petitioners demonstrated by a web of circumstantial evidence that:

> —The newspaper deliberately fabricated portions of the defamatory story;
>
> —The newspaper knew of the harm that would likely result from publication of the defamatory story;
>
> —The defamatory information published by the newspaper [inclusion of the "Mark" incident in an article on child abuse] was contradicted by the newspaper's own sources for the story;
>
> —The newspaper's editor deliberately penned a false headline;
>
> —The newspaper suppressed information favorable to the parents;
>
> —The newspaper was under no time constraints in preparing the story; and
>
> —The newspaper's investigation of the circumstances surrounding the accidental death of plaintiffs' child was cursory. [This research is the only research relevant to the punitive damages issue. The fact that the remaining portions of the child abuse article may have been "researched in depth" points out respondent's reckless conduct in failing to further verify the accuracy of the facts surrounding the accidental death of petitioners' son.]

This accumulation of evidence amply supported the jury's finding of actual malice. *Bose Corp. v. Consumers Union*, 692 F.2d 189, 196 (1st Cir. 1982), *aff'd*, 52 U.S.L.W. 4513 (U.S. Apr. 30, 1984). The Virginia Supreme Court was in error to disregard this evidence and the past decisions of this Court emphasizing its probative value.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Virginia.

Respectfully submitted,

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No. 84-1723

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

E. GREY LEWIS AND CAROLYN G. LEWIS,
Petitioners,

v.

PORT PACKET CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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QUESTIONS PRESENTED

1. Whether petitioners may raise before this Court the issue of whether actual malice must be proven by "clear and convincing evidence" in order to sustain an award of punitive damages against a media defendant in a private figure defamation action where petitioners never raised that issue or objected to that standard of proof in either the trial court or the Supreme Court of Virginia, and further where the jury instructions proffered by petitioners required proof of actual malice by clear and convincing evidence.

2. Whether the Supreme Court of Virginia acted properly in reversing and setting aside an award of punitive damages of One Hundred Thousand Dollars after making an independent examination of the entire record according to this Court's ruling in *Bose Corp. v. Consumers Union of the United States, Inc.*

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IN THE

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OCTOBER TERM 1984

E. GREY LEWIS AND CAROLYN G. LEWIS,

Petitioners,

V.

PORT PACKET CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

COUNTER-STATEMENT OF THE CASE

This is a libel action by a husband and wife, E. Grey Lewis and Carolyn G. Lewis (petitioners) against a newspaper, The Alexandria Port Packet (respondent) for statements published in an article on a matter of public and general concern: the growing problem of child abuse. The jury returned a verdict for the petitioners of Fifty Thousand Dollars compensatory damages and One Hundred Thousand Dollars punitive damages, despite the fact that the article never named petitioners or their child. Respondent herein, The Alexandria Port Packet, filed a Petition for Writ of Certiorari in this matter in this Court on May 2, 1985, No. 84-1722.

COUNTER-STATEMENT OF FACTS

A. The Parties and Background Facts[1]

The Alexandria Port Packet (the "Port Packet"), is a small weekly newspaper devoted exclusively to the coverage of the news and events of the City of Alexandria, Virginia. The newspaper is circulated throughout Alexandria and derives an insignificant portion of its income from street sales. (Record at 905) James W. Coldsmith ("Coldsmith") was at the time the subject article was published, the editor and publisher of the Port Packet.

In May 1980, Coldsmith and one of the paper's two reporters, Adrian Higgins ("Higgins") (Record at 881), became aware of and interested in the general and apparently growing problem of child abuse in Alexandria. To investigate, they met with Alexandria Commonwealth's Attorney, John Kloch, to discuss whether child abuse was indeed a problem in Alexandria. (Record 888-889) In view of information previously gathered and the clear indication that child abuse was an increasing problem in Alexandria, Coldsmith and Higgins proceeded with an article on the general issue of child abuse in Alexandria, which eventually became a two-part series published in July 1980. (Record at 889)

In preparing the series, Higgins interviewed the head of the Alexandria Child Protective Services Unit, Francine Rosenfeld, and a social worker in that office, Sandra Ryan; two Assistant Commonwealth's Attorneys, Jan Willis and

---

[1]In presenting the facts of this case, respondent relies upon the Virginia Supreme Court's recitation of the facts, J.A. at 31a through 34a, and also on the complete trial record contained in the Joint Appendix to this case when it was before the Virginia Supreme Court. To avoid confusion, references to the complete trial record set out in the Joint Appendix relied upon by the Virginia Supreme Court, are recited herein as "Record".

Randolph Sengal; Elizabeth Campagna, the director of Alexandria's Head Start Program (which deals with abused children); and reviewed a study of Alexandria jail prisoners that showed a link between child abuse and later criminal activity. (Record at 365-369) Also, a few days before the first article went to press (Record at 302), Higgins contacted Detective Sergeant Ronald Uhrig ("Sgt. Uhrig"), then Commander of the Youth Bureau Criminal Investigation Division of the Alexandria Police Department (Record at 444), to solicit information about the problem of child abuse. (Record at 297, 446) This conversation centered primarily on the problems faced by police in investigating and proving cases of suspected child abuse. (Record at 376) During the interview, Sgt. Uhrig provided Higgins with information on three cases (Record at 445-448, 456-459, 462-467) and told Higgins that each was a suspected child abuse case. (Record at 454) One involved a child who died of a fractured skull in 1978, in which an unsuccessful attempt was made to indict the child's parents. (Record at 364, 455)

With respect to the other two cases, Sgt. Uhrig told Higgins that each was currently being investigated and provided the following facts:

1. The dates that the cases came to the attention of the police (June 4th and 10th); (Record at 304)

2. The ages of the children (9 months and 2 years); (Record at 304, 310)

3. The hospitals that had treated the children (The Alexandria Hospital and Children's Hospital); (Record at 375)

4. The time that each child lived after his injury (2 days and 2 weeks); (Record at 304)

5. That both children had died of skull fractures that were not consistent with falls; (Record at 304, 462-463)

6. That both cases were classified as suspicious deaths and were being treated or investigated as homicides. (Record at 375, 465)

Sgt. Uhrig did not provide the names of the children (Record at 464) or any information as to the identity of any subjects of the investigations or suspected abusers.[2] Higgins did not attempt to elicit such information since he knew that the police were prohibited from disclosing information on the subjects of pending investigations. (Record at 298) In fact, at no time prior to the filing of this suit did anyone at the newspaper have any knowledge of the identities of the deceased children or the persons being investigated by the police. (Record at 299-301, 370-371, 899)

The petitioners in this action had an infant son who was nearly nine months old (Record at 204) on June 10, 1980, when he suffered a fractured skull after allegedly falling from a bed in their home. (Record at 205) The child was taken to Alexandria Hospital (Record at 205) where he died from his injuries on June 12th. (Record at 211) On June 13th, Dr. James Beyer, the Medical Examiner for Northern Virginia, conducted an autopsy on the Lewis child. (Record at 769)

At about 9:45 a.m. that same day, Dr. Beyer telephoned Detective Thomas Morehead ("Det. Morehead"), an investigator with the homicide division of the Alexandria Police Department. (Record at 768) Dr. Beyer advised Det. Morehead that the Lewis child's skull fracture was not consistent with a normal fall (Record at 769) and that the case should be investigated by the police as a potential homicide. (Record at 786)

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[2]Throughout the articles, Higgins used fictitious names for these cases: "Mark" and "Robert".

Det. Morehead obtained the names and address of the child's parents (Record at 770), and then contacted Randolph Sengal, (Record at 772) the Assistant Commonwealth's Attorney then assigned to the prosecution of homicides. After Det. Morehead related the information given by Dr. Beyer, Mr. Sengal and Det. Morehead initiated their homicide investigation at the Lewis home. (Record at 773)

Det. Morehead and Mr. Sengal interviewed the Lewises and received written statements from them. (Record at 773) Thereafter, Det. Morehead discussed the details of the Lewis investigation with Sgt. Uhrig (Record 451, 786-787), and formed the opinion that the child may have been abused. (Record at 786-787)

As of July 16, 1980, the date the Port Packet article was published, the death of the Lewis child was being investigated by the Alexandria Police as a potential homicide and suspected child abuse case. (Record at 790) At that time, the only subjects of the police investigation were the child's parents, Mr. and Mrs. Lewis. The fact that the Lewises were subjects of the investigation was never released to the reporter Higgins. The Port Packet first learned of this fact upon receipt of the petitioners' suit.

In writing the article, Higgins intended to inform the paper's readers, in general terms, of a growing social problem in Alexandria. (Record at 372) The story was not intended to deal specifically or in detail with the deaths of the children. (Record at 372) The information Higgins received from Sgt. Uhrig about those cases was included in the story, as were five other instances, to illustrate and emphasize the immediacy of this growing social problem. (Record at 369)

Sgt. Uhrig was Higgins' only source for the information on "Mark" in the article. Higgins did not believe it necessary to obtain further verification of the information provided by

Sgt. Uhrig since he understood and believed Sgt. Uhrig was conducting the investigation. (Record at 280, 380) Further, Higgins knew that an attempt to verify Sgt. Uhrig's information with any other person in a position to know would be futile, since such matters are held in strict confidence by the police. (Record at 316)

Coldsmith reviewed and edited Higgins' article prior to its publication (Record at 898) and discussed its progress with Higgins several times previously. (Record at 893) Coldsmith had confidence in and trusted Higgins' ability and experience as a reporter (Record at 895), and also knew that Sgt. Uhrig was the source of the information about "Mark" and "Robert," and that he was a trustworthy source who could be relied upon without need to obtain a second report. (Record at 892, 895) Coldsmith also believed that the article conformed to the applicable journalistic standards. (Record at 913)

The Lewises made no effort to contact anyone at the Port Packet either to advise the newspaper that the article contained inaccuracies or to request a clarification or retraction. (Record at 683)

B. The Decision of the Virginia Supreme Court

On appeal, the Virginia Supreme Court affirmed the jury's verdict of Fifty Thousand Dollars compensatory damages, and announced that it would adopt a negligence standard for recovery by private individual plaintiffs in defamation actions.[3] With respect to the award of One Hundred Thousand Dollars punitive damages, the Virginia Supreme Court conducted an independent examination of the entire record according to *Bose Corp. v. Consumers Union of the United States, Inc.*, ____ U.S. ____, 104 S.Ct. 1949

[3]The Port Packet has challenged that ruling in its Petition for Certiorari filed in this Court on May 2, 1985, No. 84-1722.

(1984), and determined that "the evidence is not sufficient to support a finding of New York Times 'actual malice' by clear and convincing proof." (J.A. at 43a) Petitioners herein seek to challenge that ruling on the grounds that (a) there is no basis to require proof of *New York Times* 'actual malice' by clear and convincing proof in cases involving private individual plaintiffs; (b) that the Supreme Court of Virginia misapplied this Court's holding in *Bose*, *supra*, by conducting an independent review of the factual determinations underlying the jury's finding of actual malice; and (c) by asking this Court to review the "circumstantial" evidence which allegedly supports the award of punitive damages.

REASONS FOR DENYING THE WRIT OF CERTIORARI

This Court has no jurisdiction to grant a Writ of Certiorari on an issue which was not first raised in the trial and appellate courts below. Petitioners' first issue, questioning whether *New York Times* malice must be proven by clear and convincing evidence to support an award of punitive damages was not raised by petitioners at either the trial or appellate levels of this case. Accordingly, this Court has no jurisdiction to grant a Writ of Certiorari on that issue.

Further, petitioners misstated the action of the Virginia Supreme Court in reviewing the record of the lower court to determine that the jury's finding of *New York Times* malice was unsupported by sufficient evidence. Finally, it is not the province of this Court to re-review the evidence at the trial court level, an exercise which has already been done by the Virginia Supreme Court in great depth, in order to determine, as urged by petitioners, that the circumstantial evidence established proof of *New York Times* malice.

I. PETITIONERS FAILED TO RAISE THE ISSUE OF THE LEVEL OF PROOF REQUIRED TO SUPPORT PUNITIVE DAMAGES BEFORE THE TRIAL COURT OR THE VIRGINIA SUPREME COURT

A. This Court Lacks Jurisdiction to Decide Petitioners' Standard of Proof Argument

At trial, both parties proffered to the court a jury instruction on punitive damages.[4] After a short discussion, petitioners voluntarily withdrew their instruction and counsel stated: "For the record, I will withdraw [instruction] 16 so that there is no question that I am not challenging the Court's ruling." (Record at 998) Thereafter, the parties and court agreed to use respondent's instruction M. (Record at 1052) A comparison of both instructions shows that each required proof of *New York Times* malice by "clear and convincing evidence" for recovery of punitive damages. Petitioners clearly never objected to this charge at trial.

It is well settled that an objection to a jury instruction which is first made in the appellate court will not be heard. *See, e.g., Rome v. Kelly Springfield Tire Co.*, 217 Va. 943, 234 S.E.2d 277 (1977); Rule 5:21, *Rules of the Supreme Court of Virginia*. Since the Virginia Supreme Court lacked jurisdiction to hear the issue, this Court is also barred from deciding petitioners' argument. The Supreme Court does not decide questions not raised or resolved below. *Youakim v. Miller*, 425 U.S. 231 (1976). *See also, Doe v. Watson*, 49 U.S. 263 (1849) (an objection to an instruction made for the first time before the appellate court comes too late).

In Virginia, since the instruction was not challenged, it becomes the law of the case and the court will not challenge

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[4]Both instructions are reproduced in the appendix attached hereto at pages 1a and 2a.

the correctness of the legal principle. *Lacks v. Bottled Gas Corp.* 215 Va. 94, 96, 205 S.E.2d 671, 673 (1975). Based on these basic principles of law, this petition for Writ of Certiorari should be dismissed.

B. This Court's Decisions Require that a Private Individual Plaintiff Must Prove Actual Malice by Clear and Convincing Evidence to Recover Punitive Damages

Petitioners assert that *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), left unresolved whether private individual plaintiffs must prove actual malice by a "clear and convincing" or a "preponderance of the evidence" standard in order to recover an award of punitive damages for defamation. A careful reading of this Court's opinions shows that petitioners' position is erroneous.

In *Gertz*, where the plaintiff was a private individual, this Court integrated the "clear and convincing" standard of proof into its definition of *New York Times* actual malice. 418 U.S. at 342. In clarifying the standard as applied to private individuals, the Court held that:

> The private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury. 418 U.S. at 350.

Most recently in *Bose Corp. v. Consumers Union of U.S., Inc.*, this Court again stated that:

> The burden of proving 'actual malice' requires the plaintiff to demonstrate with *clear and convincing evidence* that the defendant realized his statement was false or that he subjectively entertained serious doubts as to the truth of this statement. ____ U.S. ____, 104 S. Ct. 1949, 1965, fn. 30 (1984) (emphasis added).

By employing the following syllogism (at the risk of being repetitious), it is obvious that clear and convincing proof is required in situations where a private plaintiff is seeking punitive damages:

1. A private plaintiff who proves less than *New York Times* actual malice may only recover compensatory damages and not punitive damages. *Gertz*, 418 U.S. at 350

2. New York Times "actual malice" must be proven by clear and convincing evidence. *Bose*, 104 S.Ct. at 1965, fn. 30

3. Therefore, a private plaintiff seeking punitive damages must prove "actual malice" by clear and convincing evidence.

Contrary to petitioners' assertions, the issue of standard of proof required for punitive damages in this case has previously been resolved by this Court.

C. The Policy Considerations Regarding Punitive Damages are Different From Those Governing Compensatory Damages

Petitioners next assert that the policy reasons in *Gertz* should be read to allow a "preponderance of the evidence" standard. However, in discussing punitive damages in defamation cases, this Court has never focused on the public official/private individual distinction. Rather, this Court has focused on the important goal of protecting the First Amendment.

Further, contrary to petitioners' argument that *Gertz* allows the states greater latitude to protect the reputations of private individuals, this Court has explicitly stated that there is *no* state interest in allowing individuals to recover *punitive* damages for defamatory remarks. *Gertz*, 418 U.S.

at 348-350. The rationale for the stricter standard is that "jury discretion to award punitive damages exacerbates the danger of media self-censorship. . . ." *Id.* This *caveat* applies to cases involving both public and private figures. It is obvious that with regard to punitive damages, this Court found no basis to make such a distinction.

II. THE INDEPENDENT EXAMINATION BY THE VIRGINIA SUPREME COURT WAS PROPER

A. Independent Appellate Review Does Not Require a Public/Private Distinction

Petitioners suggest that since the case at hand involves a private figure, the appellate court should not have conducted a rigorous scrutiny of the evidence at trial. This proposition is absurd. *New York Times v. Sullivan*, 376 U.S. 254 (1964) and its progeny have never required a public official/private individual distinction in the area of appellate review of punitive damages. In order to insure that the First Amendment freedoms of speech and press are properly protected, this Court has required independent review of the evidence by appellate judges where punitive damages are awarded. *Bose Corp. v. Consumers Union of the United States, Inc.*, ____ U.S. ____, 104 S.Ct. 1949 (1984)

B. The Virginia Supreme Court Properly Reviewed the Evidence as Required by this Court

This Court's requirement of independent appellate review reflects a deeply held conviction that judges, instead of jurors, must exercise such review in order to preserve the precious liberties established and ordained by the Constitution. *Accord, Bose Corp. v. Consumers Union of United States, Inc., supra.* This Court recognized that First Amendment freedom is too important to be left solely to a jury. Hence, the established requirement that appellate judges must "independently decide whether the evidence in

the record is sufficient to cross the constitutional threshhold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'" *Id.*, 104 S.Ct. at 1965.

Contrary to petitioners' assertion, the Virginia Supreme Court did no more than that which it was required to under *Bose* and *New York Times*. *Bose* requires an assessment of the evidence germane to the actual malice determination. ___ U.S. ___, 104 S.Ct. at 1967, fn. 31. The Virginia Supreme Court made an independent review of the evidence and found that the record did not establish the required actual malice with convincing clarity. JA 43a.

In examining the pertinent evidence to support punitive damages, the Virginia Supreme Court found that the articles were researched in depth. Petitioners disagree with this conclusion. This Court has often stated that "mere proof of failure to investigate, without more, cannot establish reckless disregard for the truth." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) Several courts have used negative implication to find that:

> As long as the sources of the libelous information appeared reliable, and the defendant had no serious doubts about its accuracy, the evidence of malice [is] insufficient to support a jury verdict, even if a more thorough investigation might have prevented the admitted error. *Ryan v. Brooks*, 634 F.2d 726 (4th Cir. 1980); *See, Dickey v. CBS, Inc.*, 583 F.2d 1221, 1227 (3rd Cir. 1978); *Hotchner v. Castillo-Puche*, 551 F.2d 910, 912-14 (2d Cir. 1977); *Grzelak v. Calumet Publishing Co.*, 543 F.2d 579, 583 (7th Cir. 1975); *Vanderberg v. Newsweek*, 507 F.2d 1024, 1026-1028 (5th Cir. 1975); *Drotzmanns Inc. v. McGraw-Hill, Inc.* 500 F.2d 830, 834 (8th Cir. 1974).

Petitioners cite a recent opinion of the U.S. Court of Appeals for the D.C. Circuit, *Tavoulareas v. Washington*

Post, No. 83-1605, slip op. at 22-25 (D.C. Cir., April 9, 1985) for the proposition that the appellate court is prohibited from conducting a *de novo* review of the factual findings of evidence. Whether this opinion will become precedent is probably for later decision by this Court. Nevertheless, the *Tavoulareas* court interpreted *Bose* as permitting an appellate court to exercise its independent judgment only to the ultimate conclusion of clear and convincing proof of actual malice. *Id.* at 22-23. This is precisely what the Virginia Supreme Court did in applying its independent judgment to the ultimate conclusion and finding, after an examination of the evidence that "the record is devoid of evidence to show that the reporter or editor knew the defamatory statements were false." (J.A. at 43a)

Petitioners' final assertion is that in reviewing the evidence the Virginia Supreme Court failed to take into account circumstantial evidence tending to prove the "reckless disregard" component of actual malice. There is nothing in the Virginia Supreme Court's opinion indicating that it did not take this evidence into account. To the contrary, the opinion states that the Court reviewed "all of the evidence." (J.A. at 43a.) Petitioners state that the appellate court relied on the editor's bare assertion that he believed it complied with standards of proper journalism. However, based upon its independent review of all of the evidence, the Virginia Supreme Court found that the article had been investigated thoroughly, and that neither the reporter nor the editor knew that the statements were false.

Petitioners are attempting to have this Court re-review the record of the trial court. This exercise has already been properly conducted by the Virginia Supreme Court. It is beyond the province of this Court to re-review each independent factual determination found at trial. Since the Virginia Supreme Court properly reviewed all the evidence and

found it insufficient to prove actual malice with clear and convincing clarity, the petition for Writ of Certiorari should be dismissed.

CONCLUSION

Petitioners' failure to object to the standard of proof regarding punitive damages at trial and on appeal propel that issue out of the reach of this Court. The remaining claims of petitioners were given careful scrutiny by the Supreme Court of Virginia and were decided well within the boundaries and guidelines enunciated by this Court's rulings and do not require review or reversal by this Court. For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

INSTRUCTION NO. 16

If you find that the plaintiffs are entitled to be compensated for the damages, and if you further find by clear and convincing evidence that the defendant knew the statements to be false, or published the statements with reckless disregard for whether they were true or not, then you may also award punitive damages to punish the defendant for its actions and to serve as an example to prevent others from making such statements in the future.

If you award punitive damages, you must state separately in your verdict the amount you allow as compensatory damages, and the amount you allow as punitive damages.

Authority: Dixon v. Newsweek, Inc. 562 F2d 626 and 629 [10th Cir. 1977]

INSTRUCTION NO. M

If you find that the plaintiffs are entitled to be compensated for their damages, and if you further believe by clear and convincing evidence that the defendant made the statements with actual malice; that is, he knew they were false or he made them so recklessly as to amount to a willful disregard for the truth, then you may also award punitive damages to punish a defendant for his actions and to serve as an example to prevent others from making such statements in the future.

If you award punitive damages, you must state separately in your verdict the amount you allow as compensatory damages and the amount you allow as punitive damages.

Virginia Model Jury Instructions, No. 37.110